IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 142.

ROBERT L. OWEN, PLAINTIFF IN ERROR,

vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, DOING BUSINESS UNDER THE FIRM NAME OF DUDLEY & MICHENER, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

By leave of court granted at the conclusion of the oral argument, plaintiff in error presents this supplemental brief, being practically a reply brief to that filed for the defendants in error.

The attention of the court is explicitly called to a number of erroneous statements inserted in the brief filed by the defendants in error which are unsupported by the findings of fact.

For example, page 11, line 5, the brief states that Owen wrote Dudley & Michener to make up their account for the

services "which he knew they had rendered him." The findings of fact make no such statement and the statement is not true as a matter of fact.

A second error immediately follows, to wit:

> "He (Owen) then tells them that they need not do
> "so (furnish proof) until they are notified by him
> "to do it."

Nothing of the kind appears in the record, and it is not true as a matter of fact.

Another erroneous statement immediately follows, to wit:

> "He (Owen) then makes up his mind to make an
> "application for an allowance of fees, and he takes
> "every other associate of his into his confidence
> "except the defendants in error, and the Court of
> "Claims makes allowances to them—and out of what
> "does it make this allowance to them? It makes it
> "out of the full amount of fifteen per centum which
> "was the full amount to be paid to Vaile under
> "Vaile's contract with the Indians."

Nothing like this is found in the findings of fact. The amount of Vaile's contract is not mentioned. The taking of other associates into his confidence is not found in the findings of fact.

Such statements are highly prejudicial to the plaintiff in error.

The fact is the Court of Claims entertained the claims of numerous attorneys, including those antagonistic to the plaintiff in error, to wit: The claim of Belva A. Lockwood, employed on powers of attorney by several thousand Eastern Cherokees on a basis of 15 per centum of the recovery (see decree of Court of Claims of January 17, 1910); R. V. Belt, employed in the case four years previously to Owen's employment by contract of January 6, 1896 (Senate Document No. 143, 54th Congress, first session, paragraph 1),

under the authority of certain Eastern Cherokees of North Carolina.

John Vaile and his associates appeared under a contract made by an executive committee of a mass meeting of Eastern Cherokees held at Tucker's Springs, in Indian Territory, of September 4, 1901.

The total of these fees independently pledged by these various contracts was forty-five (45) per centum of the recovery. (record of Eastern Cherokee case, Court of Claims) and under these contracts many attorneys were employed.

These contracts of employment had no validity for the simple reason that there were thirty-two thousand Eastern Cherokees, citizens of the United States, who obviously could not be bound by a few of their number.

The validity of these contracts, as binding upon the Eastern Cherokees, was not insisted on by any of the attorneys.

In the case of the Western Cherokees the Supreme Court of the United States held, 148 U. S., 479, as follows:

> "The Old Settlers, the Western Cherokees, are not "a governmental body politic, nor have they a cor- "porate existence, nor any capacity to act collect- "ively."

This opinion applies with equal force to the Eastern Cherokees, whose status is identical.

The Supreme Court in the Western Cherokee case held that the commissioners, Wilson, Hendricks, and Bryan, had received no authority by the Old Settlers' councils, so called, to receive any part of the fund, *a principle of law which applies with equal force to the Eastern Cherokee's councils and any contracts made by them.*

The Court of Claims acted upon this principle in its decree and did not recognize the validity of any of the contracts, but *based its finding upon the evidence submitted and proof of services actually rendered,* using the expression in the face of the opinion of the court (Exhibit 1):

> "The court *having considered the evidence offered*
> " *by them* and *heard the argument of counsel* and
> " *being fully advised in the premises.*"

And thereupon the court allowed a sum equal to 15 per centum of the recovery, of which Belva A. Lockwood received $18,000, which was deducted in proportion from each of the attorneys in the case who had furnished proof of service, as follows, to wit:

John Vaile, 3 per cent, less	$3,600
R. V. Belt, 1⅔ per cent, less	2,000
Scarritt & Cox, 2 per cent, less	2,400
J. K. Jones, 1 per cent, less	1,200
M. C. Butler, 1½ per cent, less	1,800
W. H. Robeson, 1½ per cent, less	1,800
Robert L. Owen, 4⅓ per cent, less	5,200

Each of these attorneys made individual proof of service. (See opinion cited last page of this brief.)

The defendants in error in their brief again, page 11, line 19, state:

> "The court allowed all the fees contracted by the
> " Indians to be paid to John Vaile, to wit, 15 per
> " centum."

This erroneous statement is not within the findings of fact, is not true as a matter of fact, and is contradicted by the decree of the Court of Claims, herewith exhibited, of which this honorable court will take judicial cognizance (Exhibit 1).

Again, on page 12, line 2, in the brief of defendants in error, it is stated:

> "The findings of fact in this case show that no
> " one ever made any proof of any service; that the
> " Court of Claims required no proof of service by
> " any one," etc.

BLURRED PA

Nothing of the kind appears in the findings of fact and the statement is not true as a matter of fact, each of the attorneys having rendered a sworn statement of services rendered with great particularity.

No proof of Dudley & Michener's service, however, was submitted to the court.

The point at issue in this case is whether Owen's personal fee allowed on proof of service by him, under the statute of March 3, 1903, authorizing the Court of Claims to fix the fees, is chargeable with fees claimed by Dudley & Michener under the contract by which Owen employed them.

The contract itself (R., p. 7) provides the payment by Owen of $10,000 to Dudley & Michener

> "out of the fees so pledged to said Owen immedi-
> " ately upon the collection, or *in the exact proportion*
> " as said fees may be collected, it being understood
> " and agreed that this contract is conditioned upon
> " the *collection of the fees aforesaid.* And in the
> " contingency of the *said fees* **not** being *provided*
> " *for by legislation* as per the contract of the Eastern
> " Cherokee council aforesaid, **but** upon *proof of serv-*
> " *ice,* then and in that event, each of the parties
> " hereto shall prove service independently of the
> " other, and said Owen shall not be expected out of
> " fees collected for his personal service, to pay the
> " fee to Dudley & Michener," etc.

The fee pledged by Vaile to Owen was only a portion of the amount pledged to Vaile. The Vaile contract was confessedly invalid and was not enforced and Owen was not paid by virtue of its validity but "upon proof of service." The fee awarded to Owen by the decree of the Court of Claims "upon proof of service" was 4¼ per cent, less $5,200 to Belva A. Lockwood. The findings of fact state neither of two matters essential to the interpretation of this contract in the contingency of the said fees *"being provided for by legislation."* If the fees had been *"provided for by legislation,"* the $10,000 was to be paid in the *exact pro-*

GES

portion as said fees pledged to Owen should be so collected. To determine the proportion it would be necessary to know the amount of the fee pledged to said Owen by the said Vaile, and it would also be necessary to know the amount paid to said Owen by the legislative act.

The trial court made no finding of fact on either of these two points—that is, of the amount contracted to Owen by Vaile nor the amount paid to Owen—for the obvious reason that the first proposal of the contract, to wit, the collection of fees by legislative act, was not claimed by any one. It was the alternative which was asserted as a basis of the claim of Dudley & Michener—that is, the allowance of fees "upon proof of service." The trial court held that nothing was due under the contract, for the obvious reason that Dudley & Michener had not complied with its terms in proving services, which they had obligated themselves to do.

The Court of Appeals, in overruling the decision of the trial court, was compelled to argue that the *proof of service* proposed in the contingency of the fees not being "provided for by legislation" was the proof of service contemplated and required by sections 2103, 2104, 2105, 2106 of the Revised Statutes before the Commissioner of Indian Affairs and the Secretary of the Interior.

These sections relate alone to contracts made with Indians "not citizens of the United States."

We submit with absolute confidence that nothing could be more erroneous. In the first place, proof is never made before the Commissioner of Indian Affairs or the Secretary of the Interior for services rendered to an Indian or to Indian tribes, except in those cases where contracts of employment have been submitted to and approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and then only with Indians "not citizens of the United States."

Owen had no such contract.

He could not have had such contract *with citizens of the United States* if he had desired to do so.

The contract of Vaile with the Eastern Cherokees was dated September 4, 1901 (Record, page 6), and the contract of Owen with Vaile was of that date. *"Every Indian in Indian Territory" having been made a citizen of the United States previously thereto,* to wit, March 3, 1901 (31 Stats., 1447), sections 2103-21 of the Revised Statutes did not apply and could not apply to such contract, and could not therefore have been in contemplation by the contracting parties as to proof of service.

This effectually eliminates the entire argument in the opinion of the Court of Appeals.

In interpreting the contract and the meaning of the parties thereto it is of the greatest importance to consider well-known facts within the knowledge of the contracting parties bearing upon such contract.

In interpreting the language of the contract where the contingency of the fees being "provided for by legislation" is referred, the Court of Appeals utterly misconceives the meaning of this language (Record, 13, last line) and says:

> "Surely it was never contemplated by either Owen
> " or appellants that Congress would directly fix the
> " fee Owen was to receive. All that in reason could
> " have been contemplated was that legislation might
> " be enacted similar to that which was enacted. If
> " the legislation, under which he received his fee,
> " did not come within the letter of the contract, it
> " certainly came within its spirit and hence within the
> " contract."

On the contrary, we very respectfully point out that Owen did have a right to contemplate that Congress might directly fix the fee he was to receive.

Congress did directly fix the fee of the attorneys *in the companion case of the Western Cherokees,* and on more than one occasion. (See 28 Stats., 451.)

Congress directly fixed the fee of John T. Heard in the Western Cherokee case at $10,000 (28 Stats., 1009).

Congress, on June 7, 1897, in the Western Cherokee case, directly fixed the fees in specific amounts for the following attorneys in the Western Cherokee case (30 Stats., 88), to wit:

William S. Peabody	$10,000.00
Chas A. Webb	2,500.00
Marcus Irwin	2,500.00
T. H. N. McPherson	2,500.00
Mary E. Carey, executrix	2,000.00
Jno. A. Sebbald	1,000.00
Sam. W. Peelle	2,500.00
Vorhees & Jones	2,500.00
David A. McKnight	2,000.00
Belva A. Lockwood	500.00
J. L. Baugh	2,500.00
Stephen W. Parker	2,500.00
Joel M. Bryan	5,215.06

At the very time of making this contract of May 28, 1902, with Dudley & Michener, Owen, as an attorney of the Eastern Cherokees, was pressing a bill before Congress, to wit, Senate bill No. 5685, Fifty-seventh Congress, first session, introduced by Senator Cockrell May 7, 1902, *for the direct appropriation* of the fund afterwards found by the Supreme Court of the United States to be due the Eastern Cherokees.

It proved impossible to pass this bill, Senate 5685, for a direct appropriation, and it had to be abandoned. Congress, on July 1, 1902, passed the Cherokee agreement, in which, by section 68, the Cherokee Nation was authorized to bring suit, and like authority was given to any band thereof. But the Eastern Cherokees, not being a band, were compelled to seek a modification of the act of July 1, 1902, which was done on March 3, 1903 (32 Stats., 996), in which it was provided that the Eastern Cherokees should have *"the status of a band"* for the purpose of bringing suit, and further, it was

"*Provided,* That the prosecution of such suit on the
" part of the Eastern Cherokees shall be through
" attorneys employed by their proper authorities,
" their compensation for expenses and services ren-
" dered in relation to such claim to be fixed by the
" Court of Claims upon the termination of such suit."

This alternative made necessary *the proof of service* contemplated as the second alternative in the contract between Owen and Dudley & Michener.

Owen thereafter in writing, April 17, 1905, notified Dudley & Michener of the necessity *of proof of service* (Record, page 7).

Dudley & Michener made none, and never thereafter presented any claim to the court under this law, but contented themselves with bringing a personal suit against Owen to require him to pay them out of fees which he had collected for his personal services, notwithstanding the fact that their contract was expressly to the contrary.

The contract was:

"But upon proof of services, then and in that event,
" each of the parties hereto shall prove service *inde-*
" *pendently* of the other, and said Owen *shall not be*
" *expected out of fees collected for his personal serv-*
" *ice, to pay the fee to Dudley & Michener.*"

It has not been at all unusual for fees to be "provided for by legislation," as was done in the Western Cherokee case above cited and in many other cases, including the case of the Turtle Mountain band of Chippewa Indians, where Congress awarded certain persons a fee of $50,000 and appropriated that amount (33 Stats., 195).

In like manner it has frequently occurred that Congress has sent attorneys to the Court of Claims where thei rfees might be fixed "upon proof of services," as was done in the intermarried white man case, recently tried before this honorable court, in which the Cherokees were concerned.

For this reason it was only natural that both contingen-

cies should be provided for—first, where the fees were *"provided for by legislation,"* and second, where they were provided for *"upon proof of service."*

The defendants in error urge that Owen waived proof of service by the defendants in error.

There is no such finding of fact and it is not true as a matter of fact that Owen in anywise changed the contract in this particular.

The defendants in error, on page 11 of their brief, say that Dudley & Michener could not have increased or diminished the allowance of the fees made by the court.

There is no warrant for this assertion, and the contrary appears from the action of the Court of Claims in making an allowance to Belva A. Lockwood, who was not associated with Owen, but antagonistic to him. We have heretofore answered this argument and think no further reference necessary thereto.

In the findings of the trial court it is stated that under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee and that the defendants in error could not, under those rules, have claimed any fee except by permission of the attorneys of record (Record, page 8).

It is submitted that this court will take judicial notice of the rules of the Court of Claims, and that, so doing, it will discover that there are no such rules as would have prevented the defendants in error applying for the allowance of a fee to themselves.

Besides this, it is the right of any member of the bar of the Court of Claims to make application for fees where the court has authority to allow fees. The authority under which the suit of the Eastern Cherokees was prosecuted and the fee allowed is in the following words:

> "That the prosecution of such suit upon the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, and their compensation for expense and services rendered in rela-

tion to such claim, to be fixed by the Court of Claims upon termination of such suit" (32 Stat. L., part I, p. 996).

On the hearing, the attorneys for the defendants in error read a portion of a recent decree of the Court of Claims of January 17, 1910 (No. 23214, Eastern Cherokees *vs.* United States, pp. 16), wherein it is shown in the dissenting opinion, that from the 15 per cent allowed to Owen, Belt, and their associates there was first deducted eighteen thousand dollars to be paid to Belva A. Lockwood. Counsel for plaintiff in error is not sure of his right to cite from this decree in order to dispute the finding that under the rules Dudley & Michener could not have applied for the allowance of a fee to themselves; but the proposition seems to be otherwise so thoroughly negatived that the reference seems entirely justified.

Respectfully submitted.

ROBT. L. OWEN,
Plaintiff in Error.
W. H. ROBESON,
Attorney for Plaintiff in Error.

(EXHIBIT 1.)

COURT OF CLAIMS.

THE CHEROKEE NATION	No. 23,199.
THE EASTERN CHEROKEES	No. 23,214.
THE EASTERN AND EMIGRANT CHEROKEES	No. 23,212.

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the annexed three (3) pages is a true copy of the Decree as to fees of Counsel, filed by the Court May 28, 1906, in the above-entitled causes.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington City, this 19th day of October, A. D., 1909.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

IN THE COURT OF CLAIMS.

THE CHEROKEE NATION	No. 23,199.
THE EASTERN CHEROKEES	No. 23,214.
THE EASTERN AND EMIGRANT CHEROKEES	No. 23,212.

vs.

THE UNITED STATES.

These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the *original decree of May 18, 1905,* in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to

the Court that by the said mandate it is provided that the second subdivision of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the Treaties of 1835-36 and 1846, exclusive of the Old Settlers, it is therefore so ordered and decreed.

And in accordance with said decree as it was directed to be, and is now, modified it is further ordered and decreed that the Secretary of the Interior prepare or cause to be prepared a list or roll of all persons coming within the said description entitled to share in the distribution of said fund; and in preparing the said list or roll of such persons the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851 upon which the per capita payments to the Eastern Cherokees was made, and make such distribution in pursuance of Article 9 of the treaty of 1846.

And this cause coming on to be further heard upon the application of Robert L. Owen and Robert V. Belt, attorneys of record for the Eastern Cherokees, and *Mrs. Belva A. Lockwood,* attorney of record in behalf of *certain individual claimants* styled "Eastern and Emigrant Cherokees," for the allowance of compensation to them and their associates as attorneys for the respective parties, and the Court *having considered the evidence offered by them* and heard the argument of counsel, and being *fully advised in the premises,* and being of the opinion that a sum equal to fifteen per-centum of the amount due and payable, under the terms of this modified decree, to the Eastern Cherokees, to wit, one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents, with interest from June 12, 1838, to date of payment, will be a reasonable compensation to the said Robert L. Owen and Robert V. Belt and their associates, attorneys for the Eastern Cherokees, *and*

to Mrs. Belva A. Lockwood, attorney for certain individual claimants styled Eastern and Emigrant Cherokees, it is therefore, this 28th day of May, 1906, adjudged, ordered, and decreed that out of said sum named in item two of the decree payable to the Eastern Cherokees there shall first be deducted an amount equal to fifteen per centum thereof, principal and interest, as the compensation of said attorneys.

And it further appearing to the Court that of this fifteen per centum the sum of *eighteen thousand dollars is a reasonable fee to be paid to the said Mrs. Belva A. Lockwood* for her services rendered in this behalf, it is therefore ordered, adjudged, and decreed that out of the said amount there shall be paid to the said Mrs. Belva A. Lockwood the said sum of eighteen thousand dollars.

It is further ordered, adjudged, and decreed that the said fifteen per centum, less the deduction of the said eighteen thousand dollars, shall be distributed and paid to the following persons in the proportion named, to wit:

To John Vaile, 3% of such gross recovery, less.....	$3,600
To Robert V. Belt, 1⅔% of such gross recovery, less.	2,000
To Scarritt & Cox, 2% of such gross recovery, less..	2,400
To James K. Jones, 1% of such gross recovery, less.	1,2000
To Matthew C. Butler, 1½% of such gross recovery, less	1,800
To William H. Robeson, 1½% of such gross recovery, less	1,800
To Robert L. Owens, 4⅓% of such gross recovery, less	5,200

It is further ordered, adjudged, and decreed that the payment of the said fifteen per centum be made by the Secretary of the Treasury as herein directed immediately upon the appropriation by Congress for the payment of this judgment.

Filed May 28, 1906.

By the COURT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

ROBERT L. OWEN, *Plaintiff in Error.*
vs.
WILLIAM W. DUDLEY and LOUIS T. MICHENER, doing business under the firm name of Dudley & Michener, *Defendants in Error.* } No. 142.

STATEMENT.

This case comes before your Honors on a writ of error to the Court of Appeals of the District of Columbia, sued out herein for the purpose of reversing a judgment of that court against the plaintiff in error for ten thousand dollars ($10,000), with interest from July 14, 1906. The brief filed by the plaintiff in error we do not consider sets out the facts of the case as fully as is necessary for a clear understanding of the issue by the court, and we therefore desire to state them ourselves.

The suit was instituted by the defendants in error against the plaintiff in error on the 14th day of July, 1906, in the Supreme Court of the District of Columbia, and, after the issues were made up, the attorneys for the respective parties entered into a stipulation to try the case

before the court without a jury (Rec. p. 5), and the trial was had in that manner. At the conclusion of the testimony introduced by both parties, the defendants in error presented to the court a request for the following finding of facts:

> "On May 28, 1902, the plaintiffs and the defendant entered into the following contract:
>
> 'This memorandum of agreement witnesses that John Vaile, Esquire, of Forth Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of council of September 4th, 1901;
>
> And whereas, the said John Vaile has employed the services of Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts;
>
> Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners, of the firm of Dudley & Michener, the sum of ten thousand dollars ($10,000) out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this twenty-eighth day of May, 1902.

Robert L. Owen. (Seal.)
Dudley & Michener. (Seal.)

Thereafter the plaintiffs, on their part, gave to the defendant their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contract provided they should do.

On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

'The Southern,
St. Louis, April 17, 1905.

Dudley & Michener,
Washington, D. C.

Gentlemen:

I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in cases under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly,

R. L. Owen.'

A few days thereafter, the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be

appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims, the defendant, Owen, who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the court apportioned the fee of 15 per cent among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the court, and the court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the said attorneys of record.

Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to pre-

pare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905.

The defendant has never paid to the plaintiffs any sum on account of the said contract between him and plaintiffs."

And the court found these to be the only facts and all the facts that were proven in the case. No exceptions were taken by either side to the competency or admissibility of testimony during the progress of the trial, and when the court found the facts presented by the attorneys for the defendants in error to be proven, it was requested by them to find as a conclusion of law therefrom that the defendants in error were entitled to recover. The trial court refused to grant this conclusion of law, but on the contrary found in favor of the plaintiff in error and entered judgment for him.

From this judgment an appeal was taken to the Court of Appeals of the District of Columbia, in which the judgment of the lower court was reversed and a judgment in favor of the defendants in error entered. It is to correct the alleged errors in this judgment that the writ of error in this case was sued out.

It will thus be seen that there are but two questions presented to your Honors for your determination:

First, what is the true interpretation of the contract sued upon.

Second, if it should be held that it was necessary under the terms of that contract for the defendants in error to prove their services, was not such proof of services by them waived by the plaintiff in error?

I.

WHAT IS THE TRUE INTERPRETATION OF THE CONTRACT?

The contract between the plaintiff and defendants in error was one which was in turn based upon a contract between the plaintiff in error and one John Vaile, which was founded upon a contract between John Vaile and the Eastern Band of Cherokee Indians. It was under this last contract that the fee was to be paid by the Indians. It must, therefore, be presumed that the "proof of services" referred to in the contract between plaintiff in error and defendants in error was proof of service under the contract between Vaile and the Indians, and in compliance with the law as it stood when plaintiff and defendants in error made their contract. All the parties to this latter contract were men of eminence in their profession, and especially skilled in matters relating to the claims of Indians against the Government or among themselves. They knew the state of the law with reference to such matters at the time they entered into their contract, and must be presumed to have contracted with reference to it. On the 28th day of May, 1902, the date of this contract, the only law relative to the compensation of attorneys for services rendered to Indians was section 2104 of the Revised Statutes, which provides as follows:

> "* * * and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact

> in detail, and the Secretary of Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract."

In will be perceived that Section 2104 provides for a proportionate reduction by the Secretary of the Interior or the Commissioner of Indian Affairs from the amount named in a contract between the Indians and their attorneys, at the same time that it provides for the rendering of strict, itemized proof of service.

In this state of the law and with the Vaile contract before them, plaintiff and defendants in error contracted thus:

> "And in the contingency of the fees not being provided for by legislation, as per the contract with the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service to pay the fees to said Dudley & Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted to them."

This language shows beyond question that the "proof of services," contemplated by the parties, was proof to the Secretary of the Interior under the provisions of Section 2104 R. S., and that this was contemplated only as a possible contingency, it being then the purpose of

Owen to secure from Congress legislation which would take the matter from out the jurisdiction and control of the Secretary. As we will hereafter show, this legislation was secured and no application was ever made to the Secretary for the allowance and payment of fees, and of course no "proof of services" was offered to him by anyone. The contingency contemplated by the parties to the contract not having arisen, of course the entire proviso relative to "proof of services" is as dead as if it had never been a part of the contract.

Within a few weeks after Dudley & Michener and Owen made their contract, to wit, on the first day of July, 1902 (32 Stat. L., Sec. 68, p. 726), Congress invested the Court of Claims with jurisdiction to hear and determine the controversy between the United States and the Cherokee Nation, or any band thereof, providing in that section that the payment of fees to counsel should be under the supervision of the Secretary of the Interior, in accordance with Section 2104 of the Revised Statutes, which we have above quoted. This was not satisfactory to Owen and he induced Congress to pass the act of March 3, 1903 (32 Stat. L., p. 996), construing Section 68 of the act of July 1, 1902, and conferring upon the Court of Claims the right to fix the compensation of the attorneys of the Eastern Cherokees.

It was under this last mentioned act that Owen was allowed his fees by the Court of Claims. It is needless to say that these two acts of Congress constitute "legislation." The fears entertained by Owen that his contract fee would or could be scaled down by the Secretary of the Interior were thus dispelled by legislation, and the fears of the necessity for an itemized account, subjected to his scrutiny, also had vanished.

II.

IF IT SHOULD BE HELD THAT IT WAS NECESSARY UNDER THE TERMS OF THAT CONTRACT FOR THE DEFENDANTS IN ERROR TO PROVE THEIR SERVICES, WAS NOT SUCH PROOF OF SERVICES BY THEM WAIVED BY THE PLAINTIFF IN ERROR?

In discussing this phase of the case it is well for your Honors to bear in mind three important matters found as proven facts:

First. "That the defendants in error, on their part, gave to the plaintiff in error their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contracct provided they should do."

Second. "Under said decree the plaintiff in error was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and the defendants in error."

Third. "The plaintiff in error has never paid to the defendants in error any sum on account of the said contract between him and said defendants in error."

We are not surprised that the brief filed on behalf of the plaintiff in error does not allude to this phase of the controversy, and does not refer to the conduct of the plaintiff in error in this respect. His conduct is difficult to defend. The findings of fact show that "on March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

"The Southern,
St. Louis, April 17, 1905.

Dudley & Michener,
Washington, D. C.

Gentlemen:

I expect to be at Riggs House about April 28, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly,

R. L. Owen."

A few days thereafter the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims, the defendant, Owen, who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the court apportioned the fee of 15 per cent among said Owen and Belt and those associate attorneys, in accordance with their several contracts."

This is the conduct of the plaintiff in error, who had

solemnly contracted with the defendants in error that he *"will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them."* He writes them to make up their account for the services which he knew they had rendered him, as he would need it. He then tells them that they need not do that until they are notified by him to do it. He then makes up his mind to make an application for an allowance of fees, and he takes every other associate of his into his confidence except the defendants in error, and the Court of Claims makes allowances to them—and out of what does it make this allowance to them? It makes it out of the full amount of 15 per cent, which was the full amount to be paid to Vaile under Vaile's contract with the Indians. If the defendants in error had been notified to make proof of their services in the Court of Claims, as is now contended, they could not have increased or diminished the amount of the allowance of fees made by the court one penny. The court allowed all the fees contracted by the Indians to be paid to John Vaile, to wit, 15 per cent. The matter of the apportionment of that fee among Owen and his associates was left by the Court of Claims to Owen and his associates, as they might agree upon among themselves, and Owen did not notify these defendants in error of his intention either to apply for his fees or to disburse them. The last analysis of the defence interposed by the plaintiff in error here to the claim of Dudley & Michener would compel this court to so construe the contract between the parties that Dudley & Michener could not recover a single penny from Owen unless the names of both John Vaile and Robert L. Owen were actually written into an appropriation act of Congress.

We desire to say one more word on this question of proof of services. The findings of fact in this case show that no one ever made any proof of any service; that the Court of Claims required no proof of services by any one, for the simple reason that the Court of Claims was fully advised of the nature, character and extent of the services which had been rendered by Mr. Owen and his associates.

We therefore respectfully submit that the judgment of the Court of Appeals of the District of Columbia should be affirmed, and with great deference suggest that the record presents a case in which the court should impose upon the plaintiff in error the penalties prescribed by its rules and practice against persons who sue out vexatious and frivolous writs of error merely for delay.

SAM'L A. PUTMAN,
CHARLES POE,
Attorneys for Defendants in Error.